No. 18,762

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

CITY OF TACOMA, WASHINGTON, APPELLEE

Appeal From The United States District Court For The Western District of Washington

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

RAMSEY CLARK,
Assistant Attorney General.

BROCKMAN ADAMS,
United States Attorney,
Seattle, Washington.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys, Department of Justice,
Washington, D. C., 20530.

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REPLY BRIEF FOR THE UNITED STATES, APPELLANT

I

THE GOVERNMENT INTENDED TO TAKE AN UNRESTRICTED ROADWAY EASEMENT USABLE FOR ANY NORMAL ROADWAY PURPOSE, INCLUDING TRAVEL BY THE GENERAL PUBLIC

Appellee does not dispute our contention that the language in the complaint and declaration of taking clearly describes an unrestricted right of way for the road. Instead, it argues that the Government was

only authorized to take a "private roadway easement" and, in effect, contends that the complaint and declaration of taking were *pro tanto* invalid. It bases this argument on some immaterial legislative history which states (H. R. Doc. No. 271, 81st Cong., 1st sess., Cong. Doc. Ser. No. 11325, pp. 41-42):

> No plans for recreational development of the reservoir are presented. The reservoir lies entirely within the watershed area of the Tacoma municipal water-supply system and it is certain that the city would protest any development * * *. Furthermore, * * * it appears * * * that recreational facilities at the reservoir are not needed.

Whatever effect this legislative history may have on the operation of the reservoir,[1] it clearly does not prohibit the Corps of Engineers from condemning a right of way for a replacement for those parts of Forest Service Road 212 which will be flooded by Eagle Gorge Reservoir. The right of the Government to condemn land for replacement of improvements flooded out by a reservoir project is illustrated by decisions of the Supreme Court, this Court and other courts. See, e.g., *Brown* v. *United States*, 263 U.S. 78, 82 (1923) (providing a substitute town

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[1] This non-directive language is merely part of a report made by the District Engineer to his superiors, stating how it is conceived the project would operate and was not, in terms, adopted by Congress. To imply statutory limitations on executive authority from such descriptions of proposed operations of dam and reservoir projects would drastically curtail administrative flexibility contrary to established practice in executing authorized projects.

site); *United States* v. *Miller*, 317 U.S. 369 (1943) (providing a substitute railroad right of way); *St. Regis Paper Co.* v. *United States*, 313 F.2d 45 (C.A. 9, 1962) (relocation of a railroad); *Feltz* v. *Central Nebraska Public Power & Irr. Dist.*, 124 F.2d 578, 582 (C.A. 8, 1942) (relocation of a highway). Nor does the fact that the Corps of Engineers is having this land condemned for use of another government agency, the Forest Service, invalidate the taking. *United States ex rel. T.V.A.* v. *Welch*, 327 U.S. 546 (1946).

Appellee apparently concedes that the Government has authority to take the right of way for a "private roadway easement" (Br. 14, 19 *et seq.*). This brings us to the question of whether, when a taking of property is clearly authorized, the person whose property is being condemned can limit the estate taken. It is reiterated that the estate to be taken is a matter for the proper administrative official. *Berman* v. *Parker*, 348 U.S. 26 (1954); *Lewis* v. *United States*, 200 F.2d 183 (C.A. 9, 1962), cert. den., 345 U.S. 907; *Simmonds* v. *United States*, 199 F.2d 305, 306 (C.A. 9, 1952); *United States* v. *Kansas City, Kan.*, 159 F.2d 125 (C.A. 10, 1946). This rule applies to the nature of the estate, as well as to the quantity of land as the last cited cases show.

There is a second independent reason why appellee's contention that there is no statutory authority to take the estate clearly described in the complaint must fail. If appellee had such a defense to the taking, it should have been raised by an answer to the complaint within 20 days after service of notice in

this case. "A defendant waives all defenses and objections not so presented * * *." Rule 71A(e), F.R. Civ.P.[2]

Appellee challenges (Br. 9) the correctness of the statement in our opening brief (pp. 9-10) that:

> the road [being condemned here] is substantially a replacement for those parts of Forest Service Road 212 which will be flooded by the Eagle Gorge Reservoir. Accordingly, the road will be used by loggers, truckers, campers and other persons using adjacent Forest Service lands.

Appellee does not spell out the basis of its challenge. We reiterate the factual correctness of the first sentence, and contend that the proposition of the second sentence naturally follows.

Appellee asserts (at p. 10 of its brief) that the litigation between King County and the City of Tacoma, now pending in the state courts of Washington, does not involve Forest Service Road 212. (See our opening brief, p. 10, fn. 2.) Although this state litigation is admittedly not a controlling factor in this federal condemnation case, we challenge the accuracy of the assertion. We assume, of course, that the City is not making a merely technical quibble such as that

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[2] It is no answer to argue that this issue goes to jurisdiction of the court to condemn the interest described because that is the kind of objection contemplated by Rule 71A(e) (in fact, this is about the only valid defense to a taking) and even constitutional objections can be waived. *United States* v. *Nudelman,* 104 F.2d 549 (C.A. 7, 1939), cert. den., 308 U.S. 589.

the state litigation concerns a different segment of Forest Service Road 212.

Appellee attempts to inject into this appeal an issue as to why certain interrogatories served on the United States Attorney on May 15, 1962, were not answered. The Government's position is that the issue is simply not before the Court on this appeal. The record does not disclose why the interrogatories were not answered, although it may be surmised that it was because of settlement negotiations being carried on in this and related suits between the City of Tacoma and the United States. Moreover, the City of Tacoma was willing to sign a stipulation as to just compensation eight months later without ever having received an answer to its interrogatories and without insisting on an answer. In any event, the failure to answer interrogatories has no tendency to support the judgment now on appeal.

Finally, it must be noted that none of the federal cases which appellee cites actually hold that a property taking is unauthorized. Thus, all the language quoted by appellee, insofar as it seems to indicate a right to review the administrative determination as to the estate taken, is at most dictum by lower federal courts.[3] *State* v. *Rank*, 293 F.2d 340 (C.A. 9, 1961), relied on by appellee was reversed to the extent that it held the property involved (water rights) could not be taken by the administrative officers by

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[3] The error of this dicta is spelled out in a brief recently filed by the United States in another case before this Court, *United States* v. *Cobb*, No. 18,836. Copies of this brief are being transmitted to counsel for the City of Tacoma.

inverse condemnation. *Dugan* v. *Rank*, 372 U.S. 609, 623 (1963).

II

IN ANY EVENT, THE COURT COULD NOT LEAVE THE ISSUE OF THE NATURE OF THE ROADWAY EASEMENT EXPRESSLY UNDECIDED OVER THE OBJECTION OF THE CONDEMNOR

Appellee meets the second point of the Government's opening brief with the ambiguous contention that (Br. 20): "The matter has been determined with finality by the District Court insofar as needs to be determined at this time." This contention is made in the face of the express language of the final judgment that it is not deciding whether an easement "for public highway purposes or general travel" or "a private roadway only" has been acquired by these proceedings (R. 80). Aside from repetition of its first argument as to lack of power to take, this contention is simply a claim that the United States had not proved necessity for a public road to the satisfaction of the district court (e.g., Br. 20). The question of necessity has never been determined by the lower court for the reason it is an administrative, not a judicial, question. *Berman* v. *Parker*, 348 U.S. 26 (1954), and other authorities cited in Point I of our opening brief. The question of public use is, of course, a judicial question, *provided it is properly raised in the lower court.* Rule 71A(e), F.R.Civ.P. However, the question of public use cannot be raised for the first time on appeal. That there is a pre-

sumption that land condemned by the United States will be devoted to a public use is shown by the provision of Rule 71A(e), F.R.Civ.P., that objections on this ground not made within 20 days are waived. The declaration of taking itself contains a determination that it is necessary to take the estate described therein, in the opinion of the executing officer. No further proof is needed. Cf. *Old Dominion Co.* v. *United States*, 269 U.S. 55, 66-67 (1925).[4]

The appellee intimates that the Government somehow concealed the estate it desired to take or the use to which the easement will be put in the future. The estate the Government desires is clearly set forth in the complaint and declaration of taking. The plats attached to these documents show the condemned roadway easement will connect the portions of Forest Service Road 212 severed by the reservoir and another project road (R. 27-28). Appellee could hardly deny that it knows of Forest Service Road 212, which has been in existence approximately 30 years, or the uses which have been made of it. Moreover, future use which the Government makes of property it condemns is immaterial in valuation of the property taken, so long as such use does not amount to the taking of an interest in property different from that set out in the complaint. See *United States* v. *Buhler*, 305 F.2d 319, 329 (C.A. 5, 1962).

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[4] State law concerning reverter after the public use has ceased (Br. 21) has nothing to do with a federal case where there is no power of the courts so to limit the title taken. *United States* v. *Sixteen Parcels of Land in City of St. Louis*, 281 F.2d 271 (C.A. 8, 1960).

CONCLUSION

For the above reasons it is respectfully submitted that the final judgment of the district court, entered January 14, 1963, is in error in reserving in the last paragraph thereof the contention of the City of Tacoma that the United States took only a "private roadway," and that said judgment should be modified by striking said final paragraph from the judgment.

Respectfully,

RAMSEY CLARK,
Assistant Attorney General.

BROCKMAN ADAMS,
United States Attorney,
Seattle, Washington.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys, Department of Justice,
Washington, D. C., 20530.

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